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Office of the Commissioner

News & Information

Contact: Kevin Smith 609/292-7832

Notice of Proposed New Regulation

Re: Proposed New Rule: N.J.A.C. 12:60-2A.2 Concerning Off-Site Construction

Attached please find the above-referenced matter which was published in the July 1, 2002 *New Jersey Register*.

If you have any questions, please contact Frederick S. Cohen, Regulatory Officer I at 609-777-2960.

(a)

PREVAILING WAGE**Off-Site Construction Activities****Proposed New Rule: N.J.A.C. 12:60-2A.1**

Authorized By: Albert G. Kroll, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:11-56 et seq.

Calendar Reference: See Summary below for explanation of exception to the calendar requirement.

Proposal Number: PRN 2002-215.

A public hearing on the proposed new rule will be held on the following date at the following location:

Monday, July 29, 2002
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey 08625

Please call the Office of Regulatory Services at (609) 292-7375 if you wish to be included on the list of speakers.

Submit written comments by September 3, 2002 to:

Frederick S. Cohen, Regulatory Officer
Office of Regulatory Services
New Jersey Department of Labor
PO Box 110—13th Floor, Suite G
Trenton, New Jersey 08625-0110
Fax: (609) 292-8246

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The agency proposal follows:

Summary

N.J.S.A. 34:11-56.26(7) of the New Jersey Prevailing Wage Act provides that workers covered thereunder are those employed by any contractor or subcontractor and engaged in the performance of services directly upon a public work. The latter section of the Act mirrors a similar provision of the Davis-Bacon Act, 40 U.S.C. §§2769 et seq. which is itself the model for the State's Prevailing Wage Act. Thus, Davis-Bacon mandates that prevailing wage rates must be paid on Federally funded construction projects to those workers who are employed directly upon the public work work-site. Unlike the United States Department of Labor, the New Jersey Department of Labor has hitherto not promulgated regulations implementing or interpreting what constitutes the performance of services "directly upon a public work," the language utilized in N.J.S.A. 34:11-56.26(7). In order to clarify the distinction between on-site and off-site workers for the purposes of payment of the prevailing wage, the Department has determined that a new rule should be enacted which conforms to the Code of Federal Regulations while further elucidating the State's Prevailing Wage Act. This is the first time this issue has been set forth in regulatory form. It does not alter the law but reflects it.

To that end, proposed N.J.A.C. 12:60-2A.1(a) provides that the manufacture or furnishing of materials, articles, supplies or equipment will be subject to the Prevailing Wage Act if conducted in connection with, and at the work-site of, such public works projects.

Proposed N.J.A.C. 12:60-2A.1(b)1 defines the work-site as including the physical place or places where the building or work called for in the public works contract, which is subject to the terms of the Prevailing Wage Act, will remain, while proposed N.J.A.C. 12:60-2A.1(b)2 defines the work-site as any other site where a significant portion of the building, or work associated therewith, is constructed, provided that such site is established specifically for the performance of the contract or project. In addition to the foregoing, proposed N.J.A.C. 12:60-2A.1(c)1 provides job headquarters, tool yards, batch plants, borrow pits, custom fabrication centers and any other related manufacturing or construction site of the same contractor or subcontractor, shall be considered to be part of the work-site of a public works project and subject to the terms of the Prevailing Wage Act, (1) if they are dedicated exclusively or primarily to the performance of the public works contract or building project, and (2) if they are adjacent to or in virtual proximity to the site of work as set forth in the proposed N.J.A.C. 12:60-2A.1(b)1.

In sum, the proposed rule will clarify and supplement N.J.S.A. 34:11-56.26(7) of the State's Prevailing Wage Act while conforming to the Federal

regulatory standards emanating from the Davis-Bacon Act upon which the State Act is itself predicated. Moreover, by delineating what constitutes covered on-site, versus off-site, construction activities, the proposed rule will enhance implementation of the Prevailing Wage Act by more sharply defining which workers are covered thereunder.

Because the Department has provided a 64-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rule establishes a regulatory framework for determining what constitutes on-site public works construction which would be subject to the New Jersey Prevailing Wage Act. By so doing, both those contractors who bid on public works projects, and the workers who labor thereon, will be afforded a more concise understanding of the responsibilities and rights which accrue to them under the law. This result will benefit the contractors who will further understand the legal boundaries within which they must operate and to which they must conform in working on public works projects, while assuring that workers so entitled receive the appropriate payment scale for their given crafts as per the Prevailing Wage Act. Moreover, as heretofore noted, the proposed rule will bring New Jersey into conformance with the Federal regulatory scheme, thereby resulting in a uniform approach to the application of prevailing wage mandates with regard to off-site construction and manufacturing activities.

Economic Impact

The economic impact of the proposed new rule will be positive with regard to those workers who, as a result of their public works-connected job activities at a site which falls within the definitional ambit of the Prevailing Wage Act and this rule, should receive the prevailing wage rate in a given craft. Moreover, contractors will have a clearer understanding of their obligations under the law thereby permitting them to coherently anticipate expenses attendant to their participation on a public works construction project. The clarifying nature of the proposed rule should remove the ambiguities which have hitherto stemmed from the absence of rules in this area. All contracting entities which bid on and engage in public works projects are bound by the Prevailing Wage Act and, therefore, within its ambit. This rule simply mirrors the present legal state of affairs in New Jersey and the Davis-Bacon Act. Thus, the economic uncertainties which had resulted from the absence of rules will be lessened and, with it, the possibility that negative economic consequences of prevailing wage-related litigation will have to be borne by contractors and workers alike. Ultimately, implementation of the proposed rule will not add to the costs associated with public works construction since they do not impose new economic cost factors, but simply clarify the Prevailing Wage Act in its present form.

Federal Standards Statement

A Federal standards analysis is not required because the proposed rule is not subject to any Federal standards or requirements, but merely further elucidate the New Jersey Prevailing Wage Act.

Jobs Impact

The proposed rule will have no impact on jobs. The Department believes that the rule will not result in the generation or loss of any jobs, but will clarify the appropriate wages to be paid in existing employment categories by defining what constitutes the work-site for purposes of the Prevailing Wage Act.

Agriculture Industry Impact

The proposed new rule will have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed rules do not impose any additional reporting, recordkeeping or compliance requirements on small businesses as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Instead, all businesses, regardless of size, which engage in public works construction projects, will continue to maintain appropriate wage records and will continue to pay the appropriate wage rate to the various categories of workers who perform functions associated therewith. These rules are in conformance with the law as it exists now, and merely explicate present requirements. The costs associated with non-compliance with the proposed rule and, hence, with the mandate of the Prevailing Wage Act, will be borne by the violator. These costs are imposed on all businesses which violate the Act, whether large or small.

Smart Growth Impact

The proposed new rule will not have an impact on the achievement of smart growth and the State Development and Redevelopment Plan.